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No. 84-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WALTER P. COONS,

Cross-Petitioner,

vs.

HONDA MOTOR COMPANY, LTD.,

Cross-Respondent.

CROSS-PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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5-1PP

QUESTION PRESENTED

Did the court below err in determining that the New Jersey legislature violated the Commerce Clause when it enacted a tolling statute which denied the procedural remedy of a limitations defense to foreign corporations not "represented" in the State of New Jersey by persons on whom process can be served?

PARTIES BELOW

Cross-petitioner—the plaintiff-appellee in the court below—is Walter P. Coons ("Coons"), a resident of the State of New Jersey. Also appearing as a plaintiff-intervenor in the court below for the purpose of defending the constitutionality of the New Jersey tolling statute, *N.J.S.A.* 2A:14-22, was the Attorney General of New Jersey.

Petitioner-defendant—the appellant in the court below—is Honda Motor Co. Ltd., a Japanese corporation ("Honda"), a foreign corporation not registered or otherwise represented in the State of New Jersey or any other state during the time period relevant to this case.

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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WALTER P. COONS,

Cross-Petitioner,

vs.

HONDA MOTOR COMPANY, LTD.,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Pursuant to *Rule* 19.5 of this Court, cross-petitioner Coons respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey in the case entitled *Walter P. Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) holding that the New Jersey tolling statute, *N.J.S.A.* 2A:14-22, violates the Commerce Clause of the United States Constitution.

/s/ Robert H. Jaffe
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Dated: October 10, 1984

OPINIONS BELOW

The opinion of the New Jersey Supreme Court declaring the New Jersey tolling statute unconstitutional as violative of the Commerce Clause ("Coons I") is reported at 94 N.J. 307, 463 A.2d 921 (1983), Honda App. at 28a-54a.[1]

An earlier decision of the Appellate Division of the New Jersey Superior Court holding that the tolling statute is constitutional notwithstanding a challenge under the equal protection and due process provisions of the Fourteenth Amendment of the United States Constitution is reported at 176 N.J. Super. 575, 424 A.2d 446 (1980). Honda App. at 55a-64a. It is this Appellate Division opinion which ultimately was remanded, *Honda Motor Co., Ltd. v. Coons*, 455 U.S. 996, 71 L.Ed.2d 857 (1982), by this Court for further proceedings consistent with *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982).

Another decision finding that Coons was barred by the New Jersey two year statute of limitations from suit against Honda's American distributor was not reported but is reproduced in Honda's Appendix. Honda App. 65a-68a.

The opinion of the court below holding that its decision in *Coons I* should be applied prospectively, ("Coons II") rather than retroactively, is reported at 96 N.J. 419, 476 A.2d 763 (1984). Honda App. at 1a-27a.

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1. "Honda App. at 28a-54a" refers to pages 28 to 54 of Honda's Appendix to Petition for a Writ of Certiorari to the Supreme Court of New Jersey, Supreme Court Docket No. 84-385.

JURISDICTION

The judgment of the New Jersey Supreme Court in *Coons I* was rendered on August 3, 1983. Honda App. at 28a-54a. A timely petition for rehearing was filed by Coons and it was granted in part as to the issue of whether the judgment in *Coons I* was to be given prospective or retroactive effect. Honda App. at 4a.

On September 11, 1984, Honda filed a timely petition for writ of certiorari of the judgment in *Coons II* invoking the jurisdiction of this Court under Section 1257(3) of the United States Judicial Code, 28 U.S.C. § 1257(3). Pursuant to Rule 19.5 of this Court, allowing the filing of an "untimely" cross petition not more than 30 days after receipt of a timely petition for certiorari, Coons has filed this cross petition which seeks review of the decision in *Coons I* under 28 U.S.C. § 1257(3). If certiorari is granted to this cross petition and the judgment of the court below is reversed as a result, that reversal would be wholly dispositive of the issues raised by Honda in its petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provision, Article I, § 8, cl. 3 ("the Commerce Clause"), and the New Jersey statute, *N.J.S.A.* 2A:14-22 ("the tolling statute"), reproduced at page 3 of Honda's petition, the following statutes of the State of New Jersey are applicable to this case and read as follows:

14A:13-3 Admission of foreign corporations.

(2) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be

transacting business in this State, for the purposes of this act, by reason of carrying on in this State any one or more of the following activities.

(a) maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes;

14A:13-11. Transacting business without certificate of authority.

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

STATEMENT OF THE CASE

A. *Introduction*:

The judgment in *Coons I* declaring the New Jersey tolling statute, *N.J.S.A.* 2A:14-22,[2] unconstitutional as being in violation of the Commerce Clause because it requires a foreign corporation to register to do business in order to be "represented" for the purposes of taking advantage of a New Jersey statute of limitations, Honda App. at 29a-30a, could have been appealed as a matter of right by Coons pursuant to Section 1257(2) of the

2. All references to the tolling statute in this cross-petition are to *N.J.S.A.* 2A:14-22 as amended in 1949 to give foreign corporations represented by a person in New Jersey on whom process can be served the same benefit of a limitations defense as domestic corporations.

United States Judicial Code, 28 U.S.C. § 1257(2). This federal statute declares that a final judgment rendered by the highest court of a state, which draws in question the validity of any state statute on the ground of its being repugnant to the Constitution, may be appealed.

Coons did not elect to exercise his right of appeal in this case because of certain subsequent rulings by the New Jersey Supreme Court. After the judgment in *Coons I* was rendered on August 3, 1983, the cross-petitioner filed a timely petition for rehearing. On January 3, 1984, the court below granted that part of the petition which raised the question of whether the judgment in *Coons I* should be made retroactive or prospective. Honda App. at 3a-4a. Using remarkable phraseology, on June 13, 1984, the New Jersey Supreme Court ruled in *Coons II* that its earlier decision to give *Coons I* retroactive effect, "made without the benefit of an adversary hearing directed to the point," was "ill considered." Honda App. at 7a.

In addition to deciding that the decision to invalidate the New Jersey tolling statute on Commerce Clause grounds in *Coons I* should be made prospective rather than retroactive, the court below made two other material determinations in *Coons II* which favored the cross-petitioner and other similarly situated New Jersey residents represented by plaintiff-intervenor Attorney General of New Jersey and associated *amici*.

First, the New Jersey Supreme Court determined that neither Honda nor any of its supporting corporate *amici* should be given the benefit of the ruling in *Coons II*. Honda App. at 18a. This ruling in favor of the cross-petitioner constitutes an exception, although a sound one in this case, to the general rule that a litigant who succeeds in setting aside an established law should receive

the benefit of that judgment even where it is applied prospectively to other litigants.[3]

Second, the court below ruled that the effective date of its ruling in *Coons II* would be August 3, 1985, two years after the judgment in *Coons I*. Honda App. at 19a. An express reason given in the majority opinion for this delay in effective date was that:

> "(T)he hiatus effected by our conclusion in this regard affords the (New Jersey) Legislature an opportunity to address any public policy concerns that are implicated by *Coons I*." *Id.*

In short, Coons had been successful in vindicating his individual right to bring a products liability suit for personal injuries against Honda. Together with the Attorney General of New Jersey and associated *amici*, he had been instrumental in vindicating the right to sue at least until August 3, 1985 of similarly situated New Jersey residents against all unrepresented foreign corporations by virtue of the New Jersey Supreme Court decision on equitable principles to accord prospectivity "across the board" to its ruling in *Coons II*. Honda App. at 18a. The cross-petitioner thus had no reason to file an appeal or petition for certiorari of the judgment in *Coons I* until Honda made its election to file a petition with this Court seeking review of *Coons II*.

On August 23, 1984, the New Jersey legislature provided an additional reason for the filing of this cross-petition. Acting quickly to take full advantage of the "hiatus" given it by the court below, legislation was enacted to continue without interruption the procedural remedy afforded New Jersey residents by the tolling stat-

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3. The sound reasons for this exception will be detailed in the cross-petitioner's response to Honda's petition.

ute against often difficult to locate unrepresented foreign corporations. Specifically, *N.J.S.A.* 2A:14-22 was amended to provide that a foreign corporation shall be deemed "represented" in the State of New Jersey for the purposes of that statute if it has "filed with the Secretary of State a notice designating a representative to accept service of process." Coons App. at 1a.[4] To quote a part of the Accompanying Statement to this legislation, "(the amendment) is intended to meet the (New Jersey) Supreme Court's objection as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations." Coons App. at 2a.

The filing of this untimely cross-petition pursuant to *Rule* 19.5 of this Court, particularly in the event Honda's petition is granted, is for the purpose of giving Coons the opportunity to argue that, even before its recent amendment, the tolling statute did not violate the Commerce Clause.

A second but equally important purpose for this filing is the potential saving of judicial resources in state and federal courts. Unless the judgment in *Coons I* is reversed, there will be additional litigation by unrepresented foreign corporations such as Honda and its supporting *amici* over the constitutionality of the amended tolling statute. Such litigation will undoubtedly delay the resolution of asbestos exposure cases brought against *amicus* Brinco Mining Limited in New Jersey and possibly other states in accordance with the amended provisions of *N.J.S.A.* 2A:14-22, and similar state statutes. Honda Petition at 17-18.[5]

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4. "Coons App. at 1a" refers to page 1 of Coon's Appendix to the Cross-Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

5. "Honda Petition at 17-18" refers to pages 17-18 of Honda's Petition for a Writ of Certiorari to the Supreme Court of New Jersey, Supreme Court Docket No. 84-385.

B. *Factual and Procedural Background:*

On October 30, 1974, Coons suffered severe burns when, while riding his Honda CB 350 motorcycle, an accident occurred forcing his body over the gas tank toward the handlebars. As a result of a design defect in the fuel filler cap, the cap was triggered open, gasoline flowed from the tank, it ignited and the burns ensued. Honda App. at 65a-66a.

The defect in the gas filler tank, the existence of which was admitted by Honda in a letter report to the National Highway Traffic Safety Administration ("NHTSA") dated December 22, 1977, was such that during a collision the "rider may impact the hinged fuel filler cap in such a manner as to actuate the release lever resulting in opening of the cap" and if the cap opens, "gasoline will escape and cause a fire hazard." Honda App. at 67a.

The December 22, 1977 letter made references to a NHTSA investigation of the hinged fuel filler cap used on Honda motorcycles. Coons App. at 3a-5a. That investigation was actually formally commenced by the NHTSA on November 24, 1973, although an informal investigation had been ongoing at least since November 14, 1972. Coons App. at 13a.

After finally admitting the existence of a design defect in its fuel filler cap which it denied for over five years, as part of its agreement with the NHTSA, Honda initiated a recall campaign. Coons was unaware of this campaign until July 1978, when he obtained a copy of the recall notice from his neighbor. He thereafter contacted counsel and suit was filed on October 30, 1978, naming Honda and its American distributor, American Honda Motor Co., Inc., a California corporation ("American Honda"). Honda App. at 30a and 56a.

In connection with a motion to dismiss on statute of limitation grounds made by American Honda, the trial court held that Coons had sufficient facts available to him to discover the existence of his cause of action based on a defective fuel filler cap within the two year statutory period provided for actions alleging personal injuries under N.J.S.A. 2A:14-2. It therefore granted American Honda's motion to dismiss. Honda App. at 71a-72a. The trial court, however, denied a similar motion to dismiss the cross-petitioner's complaint against Honda on the basis that it was not represented in the State of New Jersey pursuant to the requirements of N.J.S.A. 2A:14-22. Honda App. at 69a.

Upholding the dismissal of the cross-petitioner's complaint against American Honda, in an opinion rendered on December 29, 1980, the New Jersey Appellate Division significantly acknowledged that an important factor in its affirmance of the trial court's judgment was the availability to Coons of a remedy against Honda by virtue of the tolling statute. As stated by the Appellate Division in its unreported *per curiam* opinion:

> "We are simultaneously herewith filing a separate opinion affirming (denial of Honda's summary judgment on limitation grounds) in the companion appeal. Hence, plaintiff's claim against the Japanese corporation will proceed to trial irrespective of our conclusion in this appeal that the claim against American Honda, the distributor in New Jersey, is barred by the statute of limitations as determined by the trial judge." Honda App. at 66a.

In the companion appeal, the same Appellate Division panel held that Coons was entitled to his day in court notwithstanding a challenge to the tolling statute on grounds that it violated the equal protection and due

process provisions of the Fourteenth Amendment of the United States Constitution. Honda App. at 55a-64a.

Honda appealed the decision of the Appellate Division allowing Coons to prosecute his product liability claims against it. Leave to appeal was denied by the New Jersey Supreme Court on March 31, 1981. Honda then filed an appeal of the Appellate Division decision to this Court. On April 7, 1982, this Court remanded this case to the Appellate Division, 455 U.S. 996, 71 L.Ed.2d 857 (1982), for further consideration in light of its remand of *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982).

As a result of the settlement of an earlier case, *Maren Engineering Corp. v. Velmohos*, 83 N.J. 282, 416 A.2d 322 (1980), *affirmed sub. nom., G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982), *vacated and remanded on other grounds*, 455 U.S. 985, 71 L.Ed 2d 844 (1982),[6] the New Jersey Supreme Court certified this case on its own motion. Honda App. at 73a. It then became the main vehicle for litigating the Commerce Clause question left open by the remand in *Searle*.[7]

C. *Analysis of Coons I*:

Justice Robert L. Clifford, joined by three other justices of the New Jersey Supreme Court to constitute a

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6. The decision in *Velmohos* was the source of the "opaque footnote," *Searle*, 455 U.S. at 414, 71 L.Ed.2d at 259, concerning what constitutes the designation of an agent for the service of process within the State of New Jersey which directly lead to the remand of *Searle* and this case.

7. As conceded by Honda in a brief submitted to the court below, however, the petitioner had failed to raise the Commerce Clause question at any time prior to remand by this Court. This is a matter that will be discussed at greater length in Coons' response to the issues raised by Honda's petition. By letter dated October 2, 1984, this Court granted an extension of time to November 13, 1984 for Coons to file his response.

slim majority, construed the term "represented" as used in *N.J.S.A.* 2A:14-22 to require that a foreign corporation obtain a certificate to do business in New Jersey pursuant to *N.J.S.A.* 14A:13-4, which in turn requires the appointment of a registered agent. Honda App. at 30a. In so ruling, the majority of the court below agreed with Justice Powell's conclusion in *Searle* that foreign corporations in the State of New Jersey "may designate an agent for service only by obtaining a certificate of authority to do business." 455 U.S. at 419, 71 L.Ed.2d at 262-263.

Having defined the term "represented" more narrowly than the definition sought by the Attorney General of New Jersey,[8] the majority in *Coons I* went on to hold that requiring foreign corporations to obtain a certificate of authority to do business in order to gain "the benefit" of a statutory limitations defense is a "forced licensure provision" and therefore *per se* violative of the Commerce Clause. Honda App. at 37a-40a.

As authority for this determination, Justice Clifford cited *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 42 L.Ed.2d 195 (1974), *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239 (1921), and *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 59 L.Ed.193 (1914), cases in which state statutes were struck down for conditioning the fundamental right of persons engaged solely in interstate commerce to sue in state court on the obtaining of a license to do business in that state. Although acknowledging that this Court in *Searle* cited *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 89 L.Ed. 1628 (1945) for the proposition that there is no

8. The position of the Attorney General of New Jersey as plaintiff-intervenor—consistent with that espoused by Coons—was that the tolling statute authorized foreign corporations to designate agents without registering to do business in the State of New Jersey. Honda App. at 35a.

fundamental right to statutes of limitation as they are "good only by legislative grace" and "subject to a relatively large degree of legislative control," 325 U.S. at 314, 89 L.Ed. at 1636, the court below nevertheless effectively treated the right to invoke a limitations defense as being equivalent to the right to sue. Honda App. at 39a.

Three justices of the New Jersey Supreme Court dissented in *Coons I*. In an opinion authored by Justice Sidney M. Schreiber, the minority interpreted the term "represented" as used in the tolling statute to require that a foreign corporation only need appoint an agent in New Jersey on whom service of process can be served in order to obtain the benefit of a limitations defense. Honda App. at 40a-47a.

The minority opinion—in agreement with an interpretation urged by the Attorney General of New Jersey—also disagreed with the determination made by the majority that the Secretary of State lacked power to receive and file a foreign corporation's designation of an agent to receive process for the purpose of complying with *N.J.S.A.* 2A:14-22 without registering to do business under *N.J.S.A.* 14A:13-4. Honda App. at 47a-50a.

Having asserted its disagreement with the majority's interpretation of the term "represented" and whether the New Jersey Secretary of State has the power to receive and file a designation of an agent on whom process may be served by foreign corporations otherwise unrepresented in New Jersey, the minority in *Coons I* then determined that appointing an agent for the service of process to obtain the benefit of a limitations defense was not "a disproportionate burden" on interstate commerce. Honda App. at 52a. Directing his discussion specifically at the petitioner, Justice Schreiber ruefully commented:

> "According to the Standard Dictionary of Advertisers (1982), Honda spent $21,500,000 on advertising in this country. Moody's International reports that Honda of Japan's sales in 1982 were $7,945,400,000. The message they send to the New Jersey consumer is clear and forceful. The Legislature has asked manufacturers to send one brief message about where they can be found in case anything goes wrong with the motorcycle." Honda App. at 52a.

The minority opinion in *Coons I*, after making a final observation that Honda could have "easily and at minimal cost" designated American Honda to accept service of process, concluded that the tolling provisions of *N.J.S.A.* 2A:14-22 did not violate the Commerce Clause. Honda App. at 54a.

Nowhere in the majority or minority opinions of the New Jersey Supreme Court that constitute the decision in *Coons I* is there any discussion of the fact that statutes of limitation—including tolling provisions which are an integral constituent thereof—go to matters of remedy and the practice of courts rather than any fundamental substantive right of litigants. The absence of any discussion of these legal concepts, however, should not be fatal to their consideration by this Court.

Similar to the issues of federal law raised by Honda in its petition, Honda petition at 2, the constitutional question of whether the Commerce Clause can be applied to invalidate procedural remedies that are part of the *lex fori* of a state court such as those provided by the tolling provisions of *N.J.S.A.* 2A:14-22 was timely raised by the cross-petitioner in papers filed in support of Coons' petition for rehearing in *Coons I*. Although rejected, they were duly presented to the court below and thus are properly before this Court.

REASONS FOR GRANTING THE WRIT

The Decision of the New Jersey Supreme Court in Coons I Declaring that Denial Of a Limitations Defense to Unrepresented Foreign Corporations Constitutes A Commerce Clause Violation is a Novel Determination in Conflict with Applicable Analogous Decisions of this Court Holding that Statutes of Limitations Are Part of the LEX FORI *or Procedural Remedies Provided by Court Rules Which Can be Denied Non-Residents of a Sovereign State*

Diligent research has failed to locate a single opinion of this Court which has dealt with the precise question presented by this cross-petition—whether Commerce Clause standards can be applied to invalidate a tolling statute which is a constituent part of a state's statute of limitations. The judgment in *Coons I* therefore constitutes the classic example of where a state court has decided an important question of federal law which has not been, but should be, settled by this Court and which otherwise conflicts with applicable analogous precedent.

To be sure, the Commerce Clause often has been invoked to invalidate diverse state statutes that parochially favor state interests or otherwise discriminate against interstate commerce. See, for example, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 64 L.Ed.2d 702 (1980) (Florida statutory scheme prohibiting investment advisory services by bank holding companies with principal offices out of the state); *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L.Ed.2d 475 (1978) (New Jersey statute prohibiting importation of solid and liquid wastes into the state); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 53 L.Ed.2d 383 (1977) (North Carolina statute imposing additional costs on

Washington, but not on North Carolina, shippers); *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S. Ct. 599 (1977) (New York statute imposing a heavier tax on transactions involving out of state sales than transactions involving intrastate sales).

There is even precedent for a reversal by this Court of a state court judgment determining that an act of its state legislature has violated the Commerce Clause. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 66 L.Ed.2d 659 (1981).

However, this Court has never before reviewed a case such as presented here where the state's highest court has invalidated on Commerce Clause grounds legislation which, to quote Chief Justice John Marshall, "relate to the remedies which are furnished in (its) courts." *Sturges v. Crowninshield*, 4 Wheat 122, 207, 4 L.Ed. 529, 551 (1817).

The nearest precedent relative to this case—and it is a very close cousin indeed—is the decision of this Court in *G.D. Searle v. Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982). In *Sear*, the constitutionality of the same statute which is the subject of Honda's petition and this cross-petition was upheld in the face of an equal protection and due process challenge under the Fourteenth Amendment mounted by the same corporate *amici* who support Honda in this case. The precise holding in this regard was stated by Justice Blackmun as follows:

> "(T)he tolling provision is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve." *Searle*, 455 U.S. at 410, 71 L.Ed.2d at 257.

Moreover, as part of its discussion of the question of whether the New Jersey legislature can constitutionally differentiate between represented and unrepresented foreign corporations in denying the latter a plea of limitations, this Court cited with approval the following proposition of law made part of the decision of the United States Court of Appeals for the Third Circuit in *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3rd Cir. 1980); *affirmed sub. nom.*, G. D. Searle & Co. v. Cohn, 455 U.S. 404, 71 L.Ed.2d 250 (1982), *vacated and remanded on other grounds*, 455 U.S. 985, 71 L.Ed.2d 844 (1982):

> "Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against nonrepresented foreign corporations which is additional to any mechanism found in the Court Rules." 628 F.2d at 811 (cited at 455 U.S. at 411, 71 L.Ed.2d at 257).

After having acknowledged in *Searle* that the tolling statute merely represents a supplement to rules regulating remedies provided under New Jersey court procedure, this Court observed that unrepresented foreign corporations in New Jersey were not left without a remedy against stale claims because they remained free to plead laches as an equitable defense when defending on the merits in the New Jersey courts. *Searle*, 455 U.S. at 411, 71 L.Ed.2d at 258 (citing as authority *Maren Engineering Corp. v. Velmohos*, 83 N.J. 282, 288-289, 416 A.2d 372, 376-379 (1980).

Predicated on its findings that the New Jersey tolling statute supplements existing court practice and that unrepresented foreign corporations had open to them the affirmative equitable defense of laches despite being denied the statutory procedural remedy of a limitations defense, this Court duly held in *Searle* that the enact-

ment of *N.J.S.A.* 2A:14-22 "does not deprive an unrepresented foreign corporation of the equal protection of the laws. (Citations omitted)." 455 U.S. at 412, 71 L.Ed.2d at 258.

As Honda will undoubtedly point out in its response to this cross-petition, the fact that a state statute passes constitutional muster on equal protection and due process grounds does not prevent it from being declared invalid under Commerce Clause standards. In *Baldwin v. Seelig*, 294 U.S. 511, 79 L.Ed. 1032 (1935), this Court invalidated the New York Milk Control Act when subjected to constitutional challenge by virtue of Commerce Clause standards although only the previous year it had held the very same statute constitutional when challenged under the Fourteenth Amendment in *Nebbia v. New York*, 291 U.S. 502, 78 L.Ed. 940 (1934).

Notwithstanding, since the New Jersey tolling statute is merely a supplement to that sovereign state's remedial procedures and court practices, it survives constitutional challenge when examined under Commerce Clause standards as well as the equal protection and due process provisions of the Fourteenth Amendment.[9]

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9. The following application of Commerce Clause standards is predicated on the determination of the majority in *Coons I* that the term "represented" as used in *N.J.S.A.* 2A:14-22 requires a foreign corporation to register to do business in the State of New Jersey on the basis that the construction given to a state statute by that state's highest court generally is binding on its litigants. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed.2d 187, 195 (1977); *Grayned v. City of Rockford*, 408 U.S. 104, 110, 33 L.Ed.2d 222, 228 (1972); *Winters v. New York*, 333 U.S. 507, 514, 92 L.Ed. 840, 849 (1948). But this Court is not so bound. See *Kern-Limerick, Inc. v.Scurlock*, 347 U.S. 110, 121, 98 L.Ed. 546, 556 (1954) (holding that this Court should decide for itself facts or constructions upon which federal constitutional issues rest); *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 674, 94 L.Ed. 439, 446 (1950) (holding that in passing upon the validity of a state tax under federal constitutional or statutory provisions, this Court is not limited by the state's characterization of the tax).

It is beyond dispute that a person engaged in interstate commerce is assured by the Commerce Clause that he has "free access to every market in the nation, that no home embargoes will withhold his exports, and no foreign state will by duties or regulations exclude them." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539, 93 L.Ed. 865, 875 (1949). The clear purpose of the Commerce Clause is protection of the American consumer from local exploitation by allowing "free competition from every producing area in the nation." *Id.* That is, while the Commerce Clause protects interstate firms from prohibitive or burdensome regulations, such protection is only afforded "when a lack of national uniformity would impede the flow of interstate goods." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 57 L.Ed.2d 91, 102 (1978).

Consistent with these standards, this Court ruled in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239 (1921) that denying a foreign corporation the right to sue unless it registers to do business in a state is an act of forced licensure void under the Commerce Clause since it denies foreign corporations a fundamental right intimately involved with the principle of free access to a national market. *Accord, Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 42 L.Ed.2d 195 (1974); see also *Sioux Remedy Co. v. Cope*, 235 U.S. 197, 59 L.Ed. 193 (1914).

Denying an unregistered foreign corporation the procedural remedy of a limitations defense pursuant to *N.J.S.A.* 2A:14-22, however, does not in any way limit that corporation's access to the New Jersey market for its products or the right to enforce a contract for their sale, even when the products are so defective that, as in this case, they present a fire hazard to consumers. The denial of a limitations remedy to an unrepresented foreign cor-

poration therefore does not impair its ability to defend a suit on the merits or to raise an equitable defense such as laches. This is made explicit in the New Jersey statutory scheme:

> "(T)he failure of a foreign corporation to obtain a certificate of authority to transact business. . . shall not impair the validity of any contract. . . and shall not prevent such corporation from defending any action or proceeding in any court of this State." *N.J.S.A.* 14A:13-11(2).[10]

Patently, the requirement that a foreign corporation register to do business under *N.J.S.A.* 14A:13-4 in order for it to invoke the procedural remedy of a limitations defense finds a rational basis in the concern the State of New Jersey has for protecting the rights of its residents to bring suit against foreign corporations such as Honda who, if it elects to capitalize on its amendment to Article 2 of the Hague Convention, 20 U.S.T. 361 (1969) may never be served with process.[11] This concern is fully con-

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10. The legislative intent to allow persons engaged solely in interstate commerce access to the courts of New Jersey, consistent with Commerce Clause standards, is also reflected in *N.J.S.A.* 14A:13-3(2) which provides that a foreign corporation shall not be considered to be transacting business in New Jersey by reason of "maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise. . ."

11. Based on Japan's objection to service of judicial process by international mail, including the elimination of the undertaking by its Central Authority to effect service of process under Article 2 of the Hague Convention, 28 U.S.C.A., Annotation to F. R. Civ. P. 4(i), there is a serious question of whether service on a Japanese corporation such as Honda which does not admit to agents within the United States, *Fields v. Peyser*, 75 Wis. 2d 644, 250 N.W. 2d 311 (1977), can be obtained short of hiring a Japanese law firm for assistance. If this becomes necessary, the case load of Japanese judges may require proceedings that would last for 8-10 years. Ramseyer, "Japan's Myth of Non-Litigiousness." *National Law Journal*, July 4, 1983.

sistent with the purpose of the Commerce Clause to assure free access to the national marketplace for persons engaged in interstate commerce so as to avoid local exploitation of the American consumer. What greater instance of consumer exploitation can there be than to allow unrepresented foreign corporations, including those such as Honda that may never be served with process, to freely ship defective products into a state and to grant these corporations the same procedural remedy of a limitations defense enacted for the benefit of domestic and foreign corporations with registered agents in that state?

In *Sioux Remedy*, *supra*, this Court held that it is "without doubt (that) a foreign corporation seeking to enforce (a right to collect) in the courts of a state may be required to conform to the prevailing modes of proceeding in those courts." 235 U.S. at 204, 59 L.Ed. at 198. As support for the foregoing proposition of law, Justice Willis Van Devanter in *Sioux Remedy* cited *Blake v. McClung*, 172 U.S. 239, 43 L.Ed. 432 (1898) where this Court held:

> "There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate. . . For instance, a state cannot forbid citizens from suing in its courts, that right being enjoyed by its own people, but it may require a non-resident. . . to give bond for cost although such bond be not required of a resident." 172 U.S. at 256, 43 L.Ed. at 438.

This Court has often reiterated that a limitation defense is not a fundamental or substantive right but a procedural remedy belonging to the *lex fori* of the jurisdiction in which relief is sought which is "good only by legislative grace" and "subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donald-*

son, 325 U.S. 304, 314, 89 L.Ed. 1628, 1636 (1945); see also *Campbell v. Holt*, 15 U.S. 620, 29 L.Ed. 483 (1885) (adopting as a working hypothesis the concept that statutes of limitation go to matters of remedy as opposed to fundamental substantive rights); *Tioga R.R. Co. v. Blossburg & Corning R.R. Co.*, 20 Wall 137, 22 L.Ed. 331 (1874) (J. Hunt, concurring) (acknowledging that tolling provisions are an integral part of statutes of limitations in various states, including *inter alia*, the State of New Jersey).

Succintly stated long ago by Justice William Johnson in *Hawkins v. Barney's Lessee*, 5 Peters 457, 8 L.Ed. 190 (1831), statutes of limitations "constitute a part of the *lex fori* of every country, they are laws for administering justice—one of the most sacred and important sovereign rights and duties" and are a subject "over which every community is at liberty to make a rule for itself." 5 Peters at 466-467, 8 L.Ed. at 193-194.

Perhaps the fullest exposition of the fact that there is no vested right to a statute of limitations—*nor its tolling provisions*—is found in the opinion of Chief Justice Waite in *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365 (1877):

> "The parties to a contract have no more vested interest in a particular limitation which has been fixed, *than they have in an unrestricted right to sue.* They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain." (Emphasis added) 95 U.S. at 633, 24 L.Ed. at 366.

Although not mentioned by the court below, on the authority of this Court's decisions in *Sturges v. Crowninshield, supra,* and *Hawkins v. Barney's Lessee, supra,* an early New Jersey high court had upheld the predecessor tolling statute to *N.J.S.A.* 2A:14-22 as being exempt from constitutional attack on the basis that as an integral part of the New Jersey statute of limitations it was part of that state's court practices controlling matters pertaining to remedial as distinguished from substantive rights.

Speaking for a four man majority of a five man Supreme Court of Judicature in *Smith's Executors v. Tucker,* 17 N.J.L. 82 (Sup. Ct. 1839), Justice William L. Dayton held that the tolling statute did not divest any person of a vested right, nor did it vary a contract, or limit existing liabilities but did directly the reverse—"for here there is no limitation, but a mere extension of the remedy against such as do not reside in or have removed from the State. This matter concerns the practice of our courts, merely; it is part of the *lex fori;* and may be altered or modified at the pleasure of the Legislature. *Sturges v. Crowninshield,* 4 Wheat. 122. *Hawkins, et al. v. Barney's Lessee,* 5 Peters, *R.* 457." 17 N.J.L. at 85-86.

Yet another sound precedent ignored by the court below bearing on the constitutional question raised by this cross-petition when the majority rendered its judgment in *Coons I* is the decision in *Martin v. Atlas Estate Co.,* 72 N.J. Eq. 416, 65 A. 881 (E. & A. 1907) holding that appointment of a registered agent does no more than create an *additional* non-exclusive agent of the corporation upon whom process may be served. The holding in *Martin* was codified by the New Jersey Legislature when it enacted *N.J.S.A.* 14A:4-2(3) which provides that designation of a registered agent "shall not exclude any other method provided by law for service of process upon

a corportion, domestic or foreign . . ." See Commissioner's Comment—1968 to *N.J.S.A.* 14A:4-2.[12]

To sum up, the judgment of the New Jersey Supreme Court in *Coons I* that the unconditional availability to unrepresented foreign corporations of a limitations defense or, alternatively, its denial, be treated as the equivalent of a fundamental substantive right such as the right to sue and therefore constitutes a *per se* violation of the Commerce Clause, is a case of first impression that mandates review by this Court. It is a judgment which conflicts with applicable analogous venerable precedent that a legislature of a sovereign state of our federal union may constitutionally differentiate between residents and nonresidents, individuals and corporations alike, in the allocation of procedural remedies and modes of proceeding in its courts. If, as Honda and its supporting corporate *amici* may suggest in response to this cross-petition, the time has come to overrule this precedent based on an expanded notion of Commerce Clause standards, it is for this Court, *not* the court below, to make that novel determination.

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12. As noted previously, the cross-petitioner has assumed for the purposes of the foregoing analysis that the interpretation of "represented" by the majority in *Coons I*—which requires a foreign corporation to register to do business in New Jersey before it can obtain the "benefit" of the tolling statute—would be binding on New Jersey litigants. This court is not so bound, however, when the construction of a state statute may determine a federal question such as application of Commerce Clause standards. See footnote 9, *supra*. Therefore, the majority construction of the term "represented" in *Coons I* is open to scrutiny by this Court on review.

CONCLUSION

Based on the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Robert H. Jaffe
ROBERT H. JAFFE
JAFFE & SCHLESINGER, P.A.
8 Mountain Avenue
Springfield, N.J. 07081
(201) 467-2246
Counsel for Cross-Petitioner
Walter P. Coons

Dated: October 10, 1984

CERTIFICATION OF COUNSEL

The undersigned, a member of the bar of this Court, hereby certifies that Honda's petition for a writ of certiorari in this case was received in the office of Jaffe & Schlesinger, P.A., attorneys for cross-petitioner Walter P. Coons, on September 13, 1984. I make this certification in connection with the claim of the cross-petitioner that this untimely cross-petition is being filed within the time limits of *Rule* 19.5 of this Court.

Dated: October 10, 1984

/s/ Robert H. Jaffe
ROBERT H. JAFFE

EXHIBIT "A"

1984 NEW JERSEY SENATE BILL NO. 953, approved August 23, 1984

AN ACT concerning the state of limitations in certain cases and amending *N.J.S.* 2A:14—22.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. *N.J.S.* 2A:14–22 is amended to read as follows:

2A:14–22. If any person against whom there is any of the causes of action specified in sections 2A:14—1 to 2A:14—5 and 2A:14—8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

2. This act shall take effect immediately.

EXHIBIT "B"

ACCOMPANYING STATEMENT TO
Senate Bill No. 953 dated June 18, 1984

N.J.S. 2A:14–22 tolls the running of the statute of limitations in civil actions against foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process. Senate Bill No. 953 would provide that a foreign corporation would be deemed represented in New Jersey for the purpose of *N.J.S.* 2A:14–22 if the corporation filed with the Secretary of State a notice designating a representative to accept service of process.

Senate Bill No. 953 was introduced in response to a recent New Jersey Supreme Court decision, *Coons v. American Honda Co., Inc.*, 94 N.J. 327 (1983). In the *Coons* case, the plaintiff was injured when he was thrown from a Honda motorcycle. Suit was instituted four years after the accident. At that point the defendant raised the two year statute of limitations as a defense. In that decision, the court determined that in order to be "represented" in the context of *N.J.S.* 2A:14–22, a foreign corporation must obtain a certificate to do business in New Jersey. The court ruled that this requirement was in violation of the commerce clause of the U.S. Constitution in that it unduly burdened interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain such a certificate.

The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of *N.J.S.* 2A:14–22 if such a notice were filed, Senate Bill No. 953 is intended to meet the Supreme Court's objections as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

Although recently a subsequent decision was rendered in the *Coons* case, it was limited to the issue of whether the *Coons I* decision should be applied retroactively. The court ruled that the decision should be applied prospectively only, from the date of the *Coons I* decision, August 3, 1983, thereby letting lawsuits to be filed until August 1985.

EXHIBIT "C"

**LETTER DATED DECEMBER 22, 1977
FROM AMERICAN HONDA MOTOR CO., INC.
TO NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION OFFICE OF COMPLIANCE**

**HONDA
AMERICAN HONDA MOTOR CO., INC.
P.O. BOX 50—100 W. ALONDRA BLVD.,
GARDENA, CALIF. 90247
CABLE ADDRESS—AMEHON, GARDENA, CALIF.
(213) 327-8280**

December 22, 1977

Office of Compliance
National Highway Traffic Safety Administration
Washington, DC 20591

Gentlemen:

On December 16, 1977, Honda Motor Co., Ltd., determined that a defect which relates to motor vehicle safety exists in the fuel filler cap release mechanism of certain Honda motorcycles.

The following defect information report is being submitted in accordance with regulations in Part 573.

1. Name of Manufacturer: Honda Motor Co., Ltd.
2. Manufacturer's Agent: Tanaka Walders & Ritger
   1819 H Street, NW
   Washington, DC 20006

2. Identification of Potentially Affected Vehicles:

Model	Description
CB 750	K0, K1, K2, K3, and 1974, 1975 and 1976 Model Years
CB 550	1974, 1975, and 1976 Model Years
CB 500	K0, K1, and K2
CB 500T	1975 and 1976 Model Years
CB 450	K3, K4, K5, K6, and 1974 Model Year
CL 450	K3, K4, K5, and K6
CB 400F	1975 and 1976 Model Years
CB 360	1974 Model Year
CB 360G	1974 Model Year

CB 360T	1975 and 1976 Model Years
CL 360	1974 and 1975 Model Years
CB 350	K3, K4, and K5
CL 350	K3, K4, and K5
SL 350	K0, K1, and K2
CB 350F	F0 and 1974 Model Year
CB 200	1974 Model Year
CB 200T	1975 and 1976 Model Years
CL 200	1974 Model Year

Dates of manufacture of affected vehicles will be supplied as soon as available.

3. Total Number of Vehicles Potentially Affected: Approximately 1,390,000.

4. Estimated Percentage of the Potentially Affected Vehicles that Contains the Defect: 100%.

5. Defect Description: During a collision, it may be possible for the rider to impact the hinged fuel filler cap in such a manner as to actuate the release lever resulting in opening of the cap. If the cap opens, gasoline will escape and cause a fire hazard.

6. Chronology of all Principle Events that were the Basis for the Determination of the Existence of a Safety Defect:

December 15, 1977	Meeting between Honda and NHTSA concerning hinged fuel filler cap investigation.
December 16, 1977	Honda Motor Co., Ltd., determined that a safety relate defect existed.

7. Measures to be Taken to Repair the Defect:

Information will be provided as soon as available.

Very truly yours,
AMERICAN HONDA MOTOR CO., INC.

/s/ C. L. Hale
C. L. HALE
Vice President
Technical Division

CH:lf

EXHIBIT "D"

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION OFFICE OF DEFECTS INVESTIGATION, INVESTIGATING REPORT O.D.I. CASE NO. C3-02 (TABLE OF CONTENTS OMITTED)

I. BACKGROUND

A. *Basis for Investigation*

This case was opened based on reports of two operators of 1971 Honda CB750 motorcycles who sustained burn injuries during a traffic accident. Both reports alleged the gas caps came opened allowing fuel to escape.

Investigation was initiated to determine whether the alleged problem constituted a safety-related defect within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966 (Act of 1966). The NHTSA's objectives were to discover whether the alleged problems occur and, if so, whether such occurrence results in fire, property damage or injury, accidents, or other safety-related problems.

B. *Description and Function*

Subject motorcycles are equipped with gas caps which are hinged on its forward side and secured by a latch on its rear side. Two styles of caps exist—the "single action" and the "double action" styles. The single action cap is opened by depressing a latch lever. The double action cap is opened by simultaneously depressing the latch lever and the cap.

C. *Analysis of the Alleged Problem*

Failure Mode: Reportedly, subject gas tank caps can be unintentionally opened in an accident situation due to rider contact with the tank cap and latch lever.

Failure Symptoms: There are no known pre-failure warning symptoms.

II. FAILURES ALLEGED AND NHTSA ACTIONS

The following reports of unintentional gas cap opening involving subject motorcycles as well as resulting injury or property damage accidents or other safety hazards were acquired during the investigation. NHTSA action, including follow-up investigation, document review and analysis, are also included herein.

A. *Consumer Reports directly to NHTSA (55) (A17) (131)**

1. John Grochala
   8242 Creek Line Drive
   San Antonio, Texas
   Date of Accident: March 17, 1974

Mr. Grochala and his wife, riding a 1973 Honda CB350 with a double action gas cap, impacted the rear of stopped pickup truck at approximately 55 mph. Both riders suffered severe orthopedic injuries.

A fire broke out resulting in reported third degree burns to Mr. Grochala's lower body. In their letter dated January 29, 1976, Honda states their belief that the Grochala cap was "closed during the fire." NHTSA examination of the gas tank shows depressions on its top surface and that the latch hook and lever are missing.

2. Alan R. Lewis (1.8) (A21.1) (131)
   130 Vernon Avenue
   Rockville, Connecticut
   Date of Accident: June 1976

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* Number shown in parenthesis represents the case file identification number wherein further details can be found.

According to Mr. Lewis, he was operating his 1973 Honda Cl-350 with a double action cap when a car turned in front of him. Anticipating the crash, he "braced" himself by placing his right hand on top of the tank and cap. He struck the car broadside at an estimated 15 to 20 mph. Following the impact, the gas cap was observed to open. No fire resulted.

3. David J. O'Connor (5) (A18) (131)
   2659 Northeast 59th Street
   Seattle, Washington
   Date of Accident: September 10, 1971

Mr. O'Connor, riding a 1971 Honda CB750 with a double action cap, struck a piece of wood in an intersection at an estimated 40 mph and crashed. A fire broke out resulting in reported third degree burns on O'Connor's legs and left hand and first and second degree burns on the other parts of his body. Mr. O'Connor believes he slid over the top of the tank and opened the cap. Honda, in the ensuing litigation, expressed their belief that the cap did not open. Three witnesses testified that they observed the cap to be open following the accident.

4. John S. Peters (1.3) (A7) (131)
   5107 W. 133rd Street
   Hawthorne, California
   Date of Accident: November 15, 1974

Mr. Peters and a passenger, on a 1973 Honda CB350 with a double action cap, struck the rear of a stopped automobile at an estimated 15 mph. A fire broke out resulting in reported serious burns to Peter's extremities and abdomen. The passenger suffered burns of his hands, leg, and crotch area. Examination of the gas tank shows depressed areas on its top half.

5. Frederick D. Stueve (1.11) (A19) (93) (131)
   2517 Lincoln Street
   Topeka, Kansas
   Date of Accident: August 31, 1975

Mr. Stueve, operating his 1972 Honda CB450 with a double action cap, was struck by an automobile traveling approximately 20 mph. The automobile's right front corner made deep penetration into the motorcycle's gas tank. A fire broke out resulting in fatal injuries to Mr. Stueve who sustained second and third degree burns over 85% percent of his body. Fuel escaped from six rivet holes in the side of the tank where an ornament was evidently mounted by the owner. The accident dynamics and the lack of damage to the motorcycle's top side suggest that Mr. Stueve did not move forcefully forward onto the tank, thus, it is considered improbable that the cap opened due to rider contact.

6. Francis W. Wheelock (A5.1) (17.1) (131)
   7655 Third Street
   Dexter, Michigan 48130
   Date of Accident: April 9, 1972

Mr. Wheelock and a passenger, on 1970 Honda CB750 with a single action cap, struck an automobile head-on at a closing speed of no less than 45 mph. The accident resulted in "serious" physical injuries to both riders. No fire occurred. Examination of the tank shows its top side to be badly dented and cap opened as per page 14.

7. Richard N. Williams (71) (A22) (131)
   1465 Seminary
   Oakland, California
   Date of Accident: May 18, 1975

Mr. Williams, operating his 1973 Honda CB750 with a double action cap, lost control of his motorcycle and

crashed. It is reported that the motorcycle's front end separated from the rest of the cycle. A fire broke out resulting in reported burn injuries to Mr. William's arms, hands, legs, pelvic and torso area. A few small dents are present on the surface of the gas tank. The cap latching mechanism is missing and could have sheared off, melted, or both.

8. Terry A. Wisler (88) (90) (91) (A21) (131)
   Key Largo, Florida
   Date of Accident: September 19, 1975

Mr. Wisler, operating his 1972 Honda CB750 with a double action cap, struck the side of a Winnebago motorhome at an impact speed of approximately 40 mph. Mr. Wisler died from severe orthopedic injuries sustained from the impact. In addition, a fire broke out causing third degree burns to his legs. The gas tank shows extensive crush damage on top side and the gas cap and portions of the latching mechanism are missing and appeared to have "torn" loose. A puncture hole approximately .25 inches in diameter was also found on the tank.

B. *Consumer Reports through Honda*

1. Augusta C. Prentiss (50) (A20) (131)
   5516 Arizona
   Concorde, California
   Date of Accident: December 8, 1973

Mr. Prentiss, operating his 1970 Honda CB750 with a double action cap, struck a vehicle head-on at an estimated closing speed of 70 mph. A fire broke out resulting in reported first, second, and third degree burns on Prentiss' face, arms, and upper body. Examination of the gas tank shows severe crush damage on its top and sides. The gas cap is missing and the latch hook is also missing.

2. Ted J. Vaughn (50) (A13) (131)
2149 W. 230th Street
Torrance, California
Date of Accident: June 12, 1973

Mr. Vaughn and a passenger, riding a 1970 Honda CB450 with a single action cap, struck the rear end of a slow moving car at an estimated speed of 30 mph. A fire broke out resulting in fatal burn injuries to Mr. Vaughn and minor burn injuries to the passenger. Examination of the motorcycle gas tank shows a small depression on its top side.

C. *International Four Owners Association (IFOA)*

The IFOA is an association of Honda motorcycle owners, particularly owners of four-cylinder Honda motorcylces. The IFOA advised the NHTSA of one accident.

1. Wiliam Mitchell (6) (A16) (131)
Crested Butte, Colorado

Mr. Mitchell, operating his 1971 Honda CB750 with a double action cap, collided with the side of a laundry truck which "sideswiped" him. A fire broke out resulting in third degree burns on Mitchell's face and 60 percent of his body. Examination of the gas tank shows extensive crush damage on its right and top side.

D. *Summary of Failures*

A total of eleven reports of unintentional gas cap opening involving subject motorcycles have been received by the NHTSA. One of these, involving Mr. Stueve, does

not appear to relate to the failure made under investigation. Details of the other ten accidents are tabled below.

Name	Estimated Closing Speed	Type of Tank Damage	Fire	No. of Burn Inj.	Fatal
Grochala	55	top surface depressed, latch broken	yes	2	0
Lewis	20	little or none	no	0	0
O'Connor	40	little or none	yes	1	0
Peters	15	top surface depressed	yes	2	0
Wheelock	45	top surface depressed	no	0	0
Williams	unk	top surface depressed, latch broken	yes	1	0
Wisler	40	top surface depressed, tank punctured, latch broken, cap missing	yes	yes	1
Prentiss	70	top surface depressed, latch broken, cap missing	yes	1	0
Vaughn	25	top surface depressed	yes	1	1
Mitchell	25	top surface depressed	yes	1	0

It is noted that the incidents involving Messrs. Grochola, Wheelock, Wisler, and Prentiss involved high speed accidents with severe orthopedic injuries to riders.

III. TECHNICAL DATA ACQUIRED AND NHTSA ACTIONS

The following information bearing upon the design, construction, materials, and performance aspects of subject motorcycles was acquired during the investigation. NHTSA action, including document review and analysis, are also included herein.

A. *Honda Motor Company*

1. *Design*

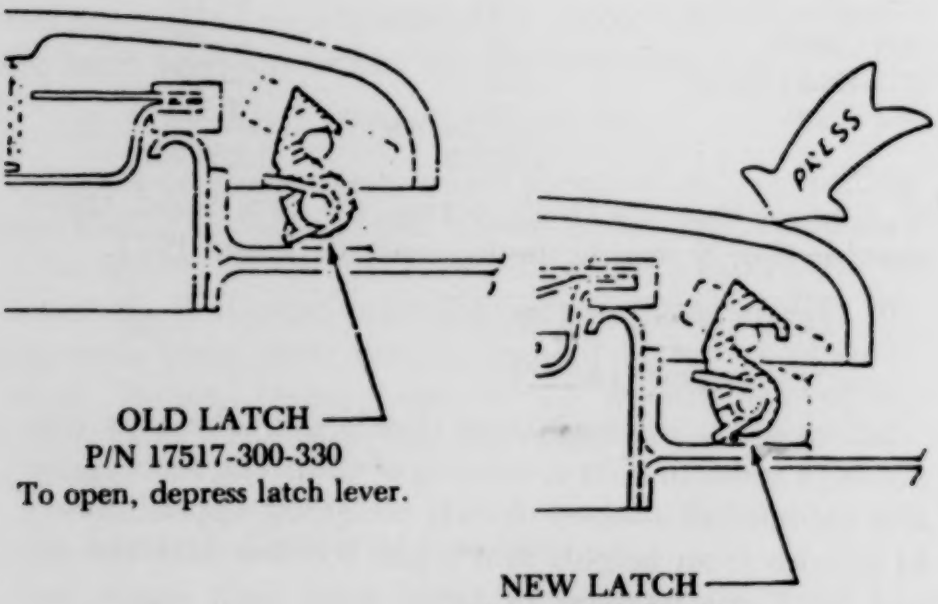
The two styles of subject gas caps are identified by the following part numbers:

Style	Part Number
single action	17517-300-330
double action	17517-300-340

A Honda service bulletin dated January 13, 1971, (130) announced that:

"Current models using the hinged fuel tank caps are equipped with a redesigned latch for additional security."

The sketch included in that service bulletin is shown below:



OLD LATCH
P/N 17517-300-330
To open, depress latch lever.

NEW LATCH
P/N 17517-300-340
To open, press fuel tank cap downward, then depress latch lever.

BEST AVAILABLE COPY

2. Construction

By letter dated April 4, 1977, (119) Honda provided production figures for motorcycle models using subject hinged gas caps.

Year and Model	No. motorcycles produced	
	single action	double action
1970-1976 CB750	38,413	243,596
1974-1976 CB550	0	81,286
1971-1973 CB500	0	86,411
1975-1976 CB500T	0	39,691
1970-1974 CB450	19,198	112,863
1970-1973 CL450	14,181	43,782
1975-1977 CB400F	0	36,585
1974 CB360	0	38,694
1975-1976 CB360T	0	93,356
1974-1975 CL360	0	19,533
1971-1973 CB350	0	193,337
1971-1973 CL350	0	126,734
1970-1972 SL350	38,727	58,049
1973-1974 CB350F	0	57,110
1974 CB200	0	13,020
1975-1976 CB200T	0	35,390
1974 Cl200	0	7,500
	110,519	1,286,937

It is noted that the single action gas caps listed above were used only during model years 1970 and 1971.

3. *Static Testing of Gas Cap*

a. *Drop Tests* (A6) (41)

Information received from Honda indicates they conducted a series of tests consisting of dropping rectangular and cannonball shaped objects weighing approximately 44 pounds from heights of 8.2 and 9.8 feet onto the cap and latch mechanisms of tanks with both single and double action caps. Of 13 drops onto tanks with single action caps, caps were observed to open in two instances. Of 11 drops onto tanks with double action caps, one

instance of cap opening occurred ue to damage of the latch hook.

b. *Latch Strength Tests* (A6)

Honda conducted tests to determine the static strength of the cap latching mechanism. Tests consisted of pulling on the latched cap from various angles. Tests were conducted using a fixture-mounted tank having a double action cap with results as shown below:

Direction of Load	Results
45 degree diagonal pull	latch hook broke at 440 lbs.
vertical pull	latch hook broke at 364 lbs.
horizontal pull	tank attaching mounts broke at 275 lbs.

c. *Crush Tests* (A6)

Honda conducted tests wherein gas tanks were run over by a "2-ton" truck. A series of four tests were run and none of the caps opened. It is noted that, in one case, the latch lever broke but the cap remained shut.

d. *Intentional Maneuver Tests* (A6)

Honda conducted tests which consisted of ". . . rolling and sliding portions of the human body, equipment and other objects on the fuel filler cap and the cap check" to determine if the cap could be opened intentionally. Using such body parts and equipment including elbows, knees, hands, boots, helmets, an athletic supporter, rollers, and a cylinder, the cap could be opened in each instance.

4. *Dynamic Testing of Gas Cap*

a. *Sled Tests* (A3)

Honda conducted tests using a sled and rail system wherein tanks, in various positions, were impacted into a

barrier. Using tanks with double action caps, tests were conducted on both production tanks and on tanks with intentionally deformed latching mechanisms. In five tests using production tanks, none of the caps opened. Of 17 tests with deformed latching mechanisms, one cap, whose latch spring was removed, opened on impact. Honda, on the basis of these tests, concludes that subject caps cannot be opened due to collision impact forces alone.

b. *Crash Tests* (A6) (41)

Honda conducted a series of eight crash tests using anthropomorphic dummies mounted on motorcycles with tanks having double action caps. Tests were conducted at various motorcycle speeds ranging from 5 to 30 mph and consisted of crashes into fixed barriers and automobiles. None of the caps opened upon impact. A similar series of three crash tests were conducted by Honda using motorcycles equipped with single action gas tank caps. These crash tests were conducted with wet paint on the cap and latch lever to determine if the dummy and the cap or latch made contact. Results of the test showed the caps did not open and that there was no contact between the dummy and the cap or latch lever.

Honda also furnished other crash test data for which they conclude that:

> ". . . tests do not show the possibility of the fuel filler cap being opened as a result of the rider's body contacting the vicinity of the cap."

5. *Honda Position*

By letter dated November 14, 1972, (12) Honda advised that, in the event of an accident, the necessary forces to open a subject cap ". . . might be created by riders" but that the chance of this happening is "extremely remote."

By letter dated January 29, 1976, (72) Honda states that ". . . subject motorcycles do not contain a defect related to motor vehicle safety." This position is based on Honda's analysis of accidents involving the alleged failure mode and on simulated crash tests for which Honda concludes that ". . . the alleged failure mode does not in fact occur in real-life situations."

B. *NHTSA Testing*

1. *ODI Static Tests* (A4)

Tests were conducted by the Office of Defects Investigation (ODI), NHTSA, to determine if subject gas caps could be opened by sliding and pressing movements of the human body on the gas cap and latch lever. Testing was conducted on a stationary motorcycle and included both single and double action caps. Significant test results showed that the single action and the double action cap could be opened by:

a. sliding the crotch area over the top of the tank.

b. sliding the left leg (shin section) across the rear portion of the cap and latch lever.

c. striking the cap and latch lever with the heel of the hand.

2. *R and D Crash Testing* (54)

Under the contract DOT-HS-126-1-186, the Office for Research and Development (R and D), NHTSA, conducted two crash tests using motorcycles equipped with Honda gas tanks with "flip-top filler caps." Both tests involved 30 mph skids, one with a dummy rider only and the other with a dummy rider and passenger. Significant reported observations were as follows.

a. Test with rider only: When the motorcycle skidded, the dummy rider is reported to have ejected

cleanly." the fuel tank filler cap remained intact with no leaking of simulated fuel.

b. Test with rider and passenger: It is reported that the front dummy ". . . made sliding pelvic contact with the fuel tank." The gas cap remained closed, however, with no loss of fuel.

IV. OTHER NHTSA ACTIONS

The following are results of other NHTSA actions taken during the investigation.

A. *Public Advisory Action*

The NHTSA's November 14, 1973, "Defect Investigatory Cases Report" announced the pendency of this investigation. A similar release, which is repeated at monthly intervals during a pending investigation, is sent to more than 4,000 newspapers, radio and television stations as well as to other media representatives, consumer groups and organizations whose total consumer readership or audience is estimated in the tens of millions. The NHTSA's February 28, 1975, release of the foregoing report announced that this case was placed in the "suspended" category.

On June 17, 1976, the Department of Transportation issued a Consumer Advisory announcing the reactivation of this case. This special advisory requested consumers to write to the Agency if they ". . . experienced gasoline leakage or fires due to dislodgement of their gas tank filler caps. . ."

B. *NHTSA Publications Search*

During this investigation, a search for pertinent published information disclosed the following:

1. *Motorcycle Facts,* National Safety Council (NSC), Chicago, Illinois, November 1974. (A10)

The NSC publication contained the following statistics regarding motorcycle accidents:

- In 1973, there were approximately 4,222,000 motorcycles registered in the United States.
- In 1973, some 360,000 accidents involving motorcycles were reported. This is 8.5 percent of the registered motorcycles.
- In 1973, 2,850 motorcyclists were killed in accidents.
- Nationally, for *all* types of vehicles, 8.1 percent of accidents involved death or injury.
- Regarding injuries, the NSC reports that ". . . the parts of the motorcyclist's bodies most often injured are the head, arm, and leg."
- Studies in two states revealed that the speed range most often recorded in motorcycle accidents was 21 mph to 30 mph.

2. *Analysis of Motorcycle Accident Reports and Statistics,* Motorcycle Safety Foundation (MSF), Linthicum, Maryland. (A10)

Based on accident statistics, the most prevalent motorcycle accident occurs in an urban environment with the motorcycle striking another vehicle. The MSF report states that:

> "Evidence demonstrates that once a motorcycle accident occurs, there is a high probability that serious injury or a fatality will result."

3. *Fire in Motor Vehicle Accidents*, Peter Cooley, Highway Safety Research Institute, University of Michigan, April 1974. (A10)

The report revealed, in part, that:

- fires occur in approximately 0.1 percent of *all* motor vehicle accidents which occur in the United States.

- of the annual fatalities occurring in vehicle accidents, 1 to 1.5 percent ". . . resulted from vehicle fires."

- The Michigan Fatal Accident File showed 3 motorcycle fatal accidents with fires. In each case, the accidents were "side-impact" crashes which "ruptured the motorcycle fuel tanks."

C. *Vehicle Population* (132)

It is estimated that of the 1,397,456 motorcycles originally manufactured with single and double action gas caps, 1,334,595 would be remaining as of June 1977.

D. *Estimate of Accidents Involving Subject Motorcycles* (132)

Based on accident statistics and the estimated vehicle population, it has been calculated that, as of June 1977, some 517,000 accidents have already occurred involving subject motorcycles. It is predicted that some 778,000 accidents will still occur for subject motorcycles during their remaining lifetimes.

E. *Record Checks*

1. *Vehicle Owner Letter File*

The NHTSA's motor vehicle owner letter file, initiated in September 1966, contains all letters and telephone con-

tacts received from all sources reporting defects and other problems with motor vehicles. At present, approximately 1,500 documents enter the file each month.

All pertinent reports found in the file are discussed under Section II.

2. *Accident Investigation Division (AID), Office of Statistics and Analysis NHTSA*

The AID contains records of accident investigations received by the NHTSA from 12 major sources, nationwide. As of September, 1975, the results of approximately 1,518,000 accident investigations are contained in the records checked by the AID.

Information relating to 17 motorcycle accidents which involved fires and/or gasoline leakage was analyzed. Eleven of the 17 did not contain information relevant to this case. The following table summarizes information regarding the remaining six cases.

Case File Index No.	Year and Model	Closing Speed	Reported Problem	Fire (Yes/No)
A5.1 *	1970 Honda 750	45	Cap opened	No
A5.3	1970 Triumph	60	Gas Line Ruptured	Yes
A5.11	1971 Kawaski 500	55-65	Gas Line Ruptured	No
A5.14	1971 Norton	35	Gas Line Ruptured	No
A5.16	1972 Honda 450	60	Fuel Tank Ruptured	No
A5.17	1972 Harley-Davidson	50	Gas Line Ruptured	Yes

* This is the Francis Wheelock accident which was discussed in section II.

The AID also furnished a summary of accident data obtained in their Michigan/Illinois study as follows: (37)

Location	Environment	No. of Accidents	No. Fires Reported
Michigan	urban/rural	4,380	0
Chicago	urban	126	0
Illinois	interstate	1,102	6

The summary states that the Michigan data is "considerably under-involved" in reported fires probably due to non-reporting. The six accidents involving fires in Illinois represent the "higher speed, more severe" accidents. These six accidents involve two Suzukis, two Harley-Davidsons, one Honda, and one BSA motorcycle. No information is available regarding fire causation.

3. *NHTSA Motor Vehicle Safety Defect Recall Campaign Log*

The log contains the make, model, model year and a brief description of the defect for all safety defect recall campaigns reported to the NHTSA by manufacturers in accordance with the Act of 1966. A search of the log disclosed no campaigns related to this investigation.

V. OBSERVATIONS

1. Of the total of 11 reports of unintentional gas cap openings, five involve relatively non-violent accidents in terms of speed, tank damage, and/or orthopedic injuries sustained by the riders. These five incidents involved Messrs. Lewis, Mitchell, O'Connor, Peters, and Vaughn.

2. An estimated 517,000 accidents have already occurred involving subject motorcycles. Some 778,000 more accidents are expected to occur involving subject motorcycles during their remaining lifetime.

Manufacturer Technical Bulletins

The NHTSA's records contain all manufacturer technical bulletins received by the NHTSA from motor vehicle and equipment manufacturers in accordance with the Act of 1966. The bulletins contain instructions for correcting purported non-safety related defects or other service related problems involving the manufacturer's product.

A search of the NHTSA files disclosed one related bulletin previously discussed in section III.

Parts Return Program (PRP)

The PRP, organized in 1971, has been participated in by approximately 500 independent automotive repair shops located throughout the United States who, since the program's inception, have submitted more than 4,500 defective parts to the NHTSA for examination as to whether they represent a safety hazard. The September 1976 PRP newsletter contained an article regarding this investigation. No data pertinent to this investigation has been received in the program.

3. Accident studies reveal that a motorcyclist, once involved in an accident, will probably suffer serious injury or death. Further, if the accident involves relatively high speeds, there is also the chance a fire will occur due to gas tank or gas line rupturing.

4. Sled and crash tests demonstrated that subject gas caps did not open due to collision impact forces alone. Anthropomorphic dummies mounted on crashed motorcycles made no apparent contact with the gas cap.

5. Static tests demonstrate that subject gas caps can be opened by an contact maneuver or impact which depresses the cap and/or latch lever in the correct design sequence. These maneuvers can include sliding and

pressing movements of the human body over the top of the gas cap and latch lever.

VI. CONCLUSION

Investigation established that unintentional gas cap opening can occur due to rider contact with the tank cap and latch lever. Five possible incidents of gas cap opening involving relatively non-violent accidents have occurred resulting in four fires and burn injuries to six riders.

Many thousands of accidents involving subject motorcycles are expected to occur in the future with the accompanying potential for gas cap opening incidents, fires, and burn injuries to riders.

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No. 84-385

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WALTER P. COONS,
Cross-Petitioner,

v.

HONDA MOTOR COMPANY, LTD.,
Cross-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

BRIEF FOR CROSS-RESPONDENT HONDA MOTOR CO., LTD. IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Supreme Court of New Jersey properly held that the New Jersey tolling statute unconstitutionally burdens interstate commerce by conditioning a foreign corporation's assertion of that State's statutes of limitation on submitting to New Jersey's licensing scheme.

PARTIES BELOW

The list of all parties to the proceeding in the court below is fully set forth at page ii of the petition for a writ of certiorari filed by Honda Motor Co., Ltd. on September 11, 1984.

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IN THE

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OCTOBER TERM, 1984

No. 84-385

WALTER P. COONS,
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v.

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Cross-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

BRIEF FOR CROSS-RESPONDENT HONDA MOTOR CO., LTD. IN OPPOSITION

Cross-respondent Honda Motor Co., Ltd. (Honda) respectfully requests that the cross-petition for writ of certiorari be denied.

COUNTERSTATEMENT

The cross-petition and its accompanying appendix include, and are replete with references to, documents not identified as being of record in this case. Rather than deal with each of the many liberties taken by the cross-petitioner in this regard, we simply note here that the relevant facts of record in this case are stated accurately and fully in the decisions of the Supreme Court of New Jersey for which review is sought herein. Pet. App. A (at 1a-27a) and B (at 28a-54a). We only wish to emphasize here that the Cross-Petition concedes that the New Jersey courts below have held that the cross-petitioner

"had sufficient facts available to him to discover the existence of his cause of action . . . within the two-year [statute of limitation period]," Cross Pet. at 9; that, under the New Jersey rules (N.J. Ct. R. 4:2-2), an action is "commenced," and the statute of limitations tolled, by filing a complaint, not by serving the defendant; and that, in any event, service upon Honda was effectuated by the cross-petitioner well within two years after his complaint was filed. Pet. App. at 66a. Accordingly, despite cross-petitioner's exaggerated complaints about the difficulty of serving Honda, the cross-petitioner could have easily brought his suit in a timely fashion. Finally, as the cross-petitioner also acknowledges, the grounds upon which the cross-petition is based were never adopted by the dissenting justices below. Cross Pet. at 13. Contrary to cross-petitioner's assertion, Cross Pet. at 13, however, the majority opinion below *did* address the issue now raised by the cross-petitioner and it summarily rejected the argument as being wholly without merit. Pet. App. B at 39a-40a.

SUMMARY OF ARGUMENT

The cross-petitioner seeks to have this Court carve out an exception from the age-old principles of its Commerce Clause jurisprudence based on a strained factual distinction which has been wrung from the record of this case. By the cross-petitioner's own admission, however, there is no supporting authority for the analysis he advances. See Cross Pet. at 13. Accordingly, the cross-petitioner is not able to show that the decision below is in conflict with any decision of this Court, of the lower federal courts, or of any state court. Moreover, the view of the law advanced by the cross-petitioner here was summarily rejected by the majority opinion below, and its lack of merit is evidenced in telling fashion by the fact that the cross-petitioner's analysis formed no basis, indeed, was not even mentioned in, the fifteen-page dissent below. As we show in detail (see pp. 3-10, *infra*) the question presented on its merits is far from worthy of this Court's further

consideration. We do, however, agree with petitioner that the New Jersey legislature's recent amendment of the statute at issue should in and of itself have no bearing on this Court's consideration of either the petition or cross-petition in this case. See pp. 11-14, *infra*.

ARGUMENT

There Is No Substantial Question Presented Because the Court Below Correctly Applied This Court's Well-Settled Commerce Clause Principles in a Manner That Cross-Petitioner Concedes Creates No Conflict with Decisions of This Court, Lower Federal Courts, or Other State Courts.

A. *The Lower Court's Holding.* Pursuant to a remand from this Court, 455 U.S. 996 (1982), the New Jersey Supreme Court struck down the New Jersey tolling statute at issue here on Commerce Clause grounds. In so doing, the lower court first responded to this Court's request that an ambiguity in the tolling statute be resolved. The lower court ruled that the New Jersey tolling statute requires that non-New Jersey corporations register to do business in New Jersey in order to gain the benefit of the state's statutes of limitation. Pet. App. 29a-30a.[1] After so construing the tolling statute, the New Jersey Supreme Court went on to hold that, under a long line of

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[1] In *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), this Court, over the dissent of Justice Stevens, ruled that the New Jersey tolling statute did not violate the Equal Protection Clause. Nevertheless, this Court remanded *Searle*, and ultimately this case, for resolution of an ambiguity in the tolling statute, which, when resolved, would clarify the constitutionality of the tolling statute under the Commerce Clause. *Id.* at 412-14; 996. The specific ambiguity in the statute which caused this Court to remand in *Searle* and in this case was the question of what precisely a foreign corporation—*i.e.*, one not incorporated in the State—must do to be "represented in [New Jersey] by any person or officer upon whom summons or other original process may be served" within the meaning of the tolling statute.

decisions of this Court, the tolling statute constituted a "forced licensure" provision in violation of the Commerce Clause. In relevant part, the court's reasoning was as follows:

> [T]he Supreme Court has invalidated state statutes, * * * as *per se* violations of the Commerce Clause in the area of licensing requirements imposed on foreign corporations involved in interstate commerce. In a series of decisions the Supreme Court has held that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. *See Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914).
>
> * * * The legislature * * * cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional. *Id.* at 38a-40a.

B. *Cross-Petitioner's Question Presents No Conflict.* When the atmosphere of the cross-petition are put to one side, the sole question it presents is whether the long line of this Court's authority relied upon by the New Jersey Supreme Court in the passage quoted above is apt in this case. The cross-petition distinguishes those Commerce Clause cases cited by the New Jersey Supreme Court on the grounds that each involved a denial by a state of the right to sue to foreign corporations; this case is different, cross-petitioner contends, because New Jersey's tolling statute does not interfere with a foreign corporation's right to sue, but, instead, precludes foreign corporations from raising New Jersey statutes of limitations. The cross-petitioner not only concedes that the dissent below did not rely upon this strained distinction to argue that the New Jersey statute satisfies the federal

Constitution, Cross Pet. at 13,[2] but the cross-petitioner further acknowledges that he has found *no* authority which attaches any significance to its analysis. *Id.* at 14. Accordingly, the cross-petitioner does not—and, indeed, he cannot—assert that the decision at issue is in conflict with any decisions of this Court or with any decisions of other state or federal courts. Manifestly, then, there is no important question of constitutional law at stake requiring review by this Court. In any event, we show below that when viewed against this Court's broad Commerce Clause rulings, cross-petitioner's attempt to attach significance to the factual distinction it draws is wholly without merit.

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[2] The dissent below premised its Commerce Clause analysis upon its own construction of the New Jersey tolling statute. Unlike the majority, it found that a non-New Jersey corporation did not have to register in New Jersey to gain the benefits of the statutes of limitations; instead, "all that is required . . . to obtain the general benefits of a statute of limitations [under New Jersey law] is that [the foreign corporation] appoint an agent for service of process." Pet. App. 41a. The dissent then concluded—in our view incorrectly (see n.6, *infra*)—that, because its reading of the statute imposed such a minimal licensing burden on a foreign corporation, there was no Commerce Clause violation.

Cross-petitioners cannot advance the position of the dissent here, because, as they recognize (Cross Pet. at 17 n.19), state "courts 'have final authority to interpret . . . State[] legislation,'" *Brown* v. *Ohio*, 432 U.S. 161, 167 (1977), quoting *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), and this Court could only adopt the reasoning of the dissent if it disregarded the majority opinion's construction of the New Jersey tolling statute. Cross-petitioner feebly suggests (Cross Pet. at 17 n.9) that this Court may not be limited by a state supreme court's interpretation of its own law when federal constitutional issues are at stake. The cases cross-petitioner cites in support of this proposition, however, are wholly inapt. They involve cases where this Court has refused to follow a state court's construction of a contract to which the United States is a party on grounds that contracts of this nature are governed by federal, rather than state, common law. See, *e.g.*, *United States* v. *Seckinger*, 397 U.S. 203, 209 (1970); Wright, *Law of Federal Courts* § 60 at 396 & n.12 (4th ed. 1983).

C. *The Settled Law.* It is an age-old and fundamental axiom of Commerce Clause jurisprudence "that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce no matter how [meritorious] the pretext may be for imposing it." *Crutcher* v. *Kentucky*, 141 U.S. 47, 58 (1891). See also, *e.g.*, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278-79 (1961); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 291 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); L. Tribe, *American Constitutional Law* § 6-13 at p. 342 (1978).

Thus, a foreign corporation engaging exclusively in interstate commerce within a state has a right to be free of a state's licensing requirements. This Court, in turn, has concluded that this kind of right is "of a Constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). It has given effect to this doctrine by repeatedly invalidating state statutes which required foreign corporations engaged exclusively in interstate commerce to forego their right to sue in state courts as a condition of avoiding state licensing requirements. See, *e.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974) (invalidating statute making the receipt of a certificate of authority a condition to the right to sue in state court); *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra* (invalidating statute making the receipt of a license and agreement that process can be served upon the secretary of state a condition to the right to sue); *Buck Stove & Range Co.* v. *Vickers*, 226 U.S. 205 (1912) (invalidating statute making the receipt of a license, agreement to designate the secretary of state for service of process, payment of a school tax, and the filing of a corporation charter a condition to the right to sue). In this regard, state statutes have been struck down even when court access has been conditioned on only minimal infringements

upon interstate commerce. See, *e.g.*, *International Textbook Co.* v. *Pigg*, *supra* (invalidating statute making the receipt of a $25.00 license and agreement that service could be effected on secretary of state a condition to the right to sue).

D. *The Lower Court Properly Applied Settled Law.* The cross petitioner's attempt to suggest some type of meaningful distinction for the purposes of Commerce Clause analysis between conditioning the free flow of interstate commerce on forsaking the right to sue and forsaking the right to assert what may be a dispositive limitations defense is unavailing. The majority in *Coons I*, following the analytical lead suggested to it by Justice Powell in *Searle*,[3] rejected this distinction because it could not be accommodated by the breadth of this Court's well-settled Commerce Clause rulings. For example, the *Coons I* majority noted that in

> striking down a Kentucky statute that prevented such a suit, the *Dahnke-Walker* Court held that
>
> > "[a] corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. [257 U.S. at 291.]" Pet. App. at 39a.

Accordingly, the court reasoned that in the Commerce Clause cases relevant to the question at hand, this Court has "spoke[n] in broad terms, *declining to limit decision*

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[3] Justice Powell, joined by Chief Justice Burger, dissented to the remand in *Searle* on the grounds that the New Jersey tolling statute was not at all ambiguous and clearly required that foreign corporations register to do business in New Jersey to obtain state statutes of limitations. 455 U.S. at 415-19. Justice Powell went on to note that the Commerce Clause challenge to the tolling statute had "considerable force," citing *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974. 455 U.S. at 419-20.

to the 'right to sue' context." Id. (emphasis added). The *Coons I* court further observed that this Court has "focused on the importance of leaving interstate commerce unfettered." *Id.*

Again, this Court has made it clear that "rights of a Constitutional stature," such as "[e]ngaging in interstate commerce," "may not [be] condition[ed] by the exaction of a price." *Garrity* v. *New Jersey, supra*, 385 U.S. at 500. See also, *e.g.*, L. Tribe, *supra*, § 6-13, at 342-343 & n.5. Thus, it was not the lower court's burden to demonstrate that the price of foregoing the right to assert a limitations defense is as high as the price of foregoing the right to sue—although we believe it clearly is as high.[4] The only question is whether foregoing the protection of the statute of limitations is "the exaction of a price" at all. This Court, in *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), made quite clear that it is, when it said:

> Statutes of limitation, which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail

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[4] Indeed, a foreign corporation can immediately overcome the bar to its right to sue upon existing claims by submitting itself to the state's licensing system. See *e.g.*, *Grow Farms Corp.* v. *National State Bank*, 167 N.J. Super. 102, 400 A.2d 535 (1979) (foreign corporation allowed to obtain certificate during pendency of action, if necessary, in order to avoid motion to dismiss); *Day* v. *Stokes*, 97 N.J. Eq. 378, 127 A.2d 331 (1925) (certificated foreign corporation may sue on contract executed before certification); *Protective Finance Corp.* v. *Glass*, 100 N.J.L. 85, 2 N.J. Misc. 818, 125 A. 879 (1924) (same). But licensing will *not* automatically entitle a foreign corporation to assert a limitations defense as to pending claims. Instead, as the terms of the tolling make plain, licensing will only commence the *running* of the limitations statute—clearly a "price" which exceeds that found in "the right to sue" context.

> over the right to prosecute them." * * * We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938).

E. *The Inapplicability Here of Equal Protection Analysis.* Cross-petitioner's reliance on a series of equal protection and due process cases holding that statutes of limitations do not constitute a "fundamental right" of a litigant does not in any way affect the foregoing analysis. As *Searle* itself demonstrates, the question of whether there is a fundamental right to a statute of limitations is *only* relevant to Equal Protection analysis, because if there were a fundamental right to statutes of limitation, the Court would have had to review the classification under heightened scrutiny. 455 U.S. at 408. See also, *e.g.*, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973) (heightened scrutiny required when state statute "operates to disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution"). In Commerce Clause analysis, in contrast, the important issue is the discrimination against or burden on interstate commerce —not whether any fundamental right is involved. This distinction between Equal Protection and Commerce Clause analysis is implicit in this Court's remand in *Searle*, since this Court remanded *Searle* to determine if the statute violated the Commerce Clause, even after ruling that the statute did not violate Equal Protection. 455 U.S. at 412-14. Indeed, cross-petitioner acknowledges that "[the fact] that a state statute passes constitutional muster on equal protection and due process grounds does not prevent it from being declared invalid under Commerce Clause standards." Cross Pet. at 17. As we have shown (see pp. 6-8, *supra*), under the Commerce Clause analysis relevant here, the question is only whether the free exercise of interstate commerce is "condition[ed] by the exaction of a price." And, as *United States* v. *Kubrick*, *supra*, 444 U.S. at 117, makes clear, requiring a foreign

corporation to forego statute of limitations defenses as a condition of engaging in interstate commerce free of state regulations *is* an "exaction of a price," see pp. 8-9, *supra*, even if it may not be the abrogation of a fundamental right.

In sum, "the decision below merely applies principles previously approved by the Supreme Court, and applies them correctly," R. Stern & E. Gressman, *Supreme Court Practice* 315 (5th ed., 1978), and in such a circumstances, certiorari is traditionally denied by this Court. *Id.*[5]

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[5] The *Allenberg*-line of cases, upon which the majority in *Coons I* relied and which Justice Powell, joined by Chief Justice Burger, cited in *Searle*, see n.3, *supra*, apply a virtual *per se* rule of invalidity to state statutory schemes which impose licensing requirements on foreign corporations engaged only in interstate commerce. These cases are to be distinguished from other Commerce Clause decisions of this Court which do not involve classic, discriminatory "forced licensure" formats, and which therefore apply a balancing test to determine if there is a Commerce Clause violation, *i.e.*, that a state law which regulates "even-handedly" but which imposes "indirect" or "incidental" burdens on interstate commerce is invalid if "the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefit." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Accord, *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981). But even if the "balancing" test of *Pike* were applied here, the New Jersey statute at issue would still be invalid. As we have shown, the burdens imposed by the tolling statute on interstate commerce are substantial, while the local benefit which was initially to be derived from that statute is now being fulfilled by other means.

The original purpose in enacting the tolling provision at issue was to prevent statutes of limitation from applying in actions in which foreign corporations could not be served because of the then-existing restrictions on the extraterritorial reach of New Jersey's service of process rules. See, *e.g.*, *Velmohos* v. *Maren Engineering Corp.*, 416 A.2d 372, 376-77 (N.J. 1980). Those restrictions have now been largely, if not completely, removed. N.J. Ct. R. 4:4-4(c) & (e). See *Avdel Corp.* v. *Mecure*, 277 A.2d 207, 209 (1971) (long-arm rule in New Jersey reaches to limit of due process). To the extent that New Jersey plaintiffs still have any difficulties in effectuating service on foreign corporations, the New Jersey rules

F. *The Irrelevance of the New Legislation.* Finally, there is one point on which we agree with the cross-petitioner, *i.e.*, that the New Jersey legislature's recent amendment of the New Jersey tolling statute in and of itself should have no bearing on this Court's consideration of either the petition or the cross-petition. See Cross Pet. at 6-7. The new tolling statute deletes the requirement that a foreign corporation must register to do business in New Jersey to gain the benefit of the New Jersey statutes of limitation. Instead, a foreign corporation must now "file[] with the Secretary of State a notice designating a representative to accept service of process." Cross App. at 1a. A filing of this nature merely terminates the tolling of the applicable statute of limitations, and that statute of limitations therefore only begins to run against the foreign corporation on the date of that filing. *Id.*; see also n.6, *supra*. The new legislation became effective upon its date of enactment, August 23, 1984, *id.*

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provide a sensible solution for this problem. Under N.J. Ct. R. 4:2-2, a civil action is commenced (and the statute of limitations tolled) by filing a complaint, not by service on a defendant. A plaintiff may therefore protect himself against a limitations bar by filing a complaint, even if he anticipates difficulty in serving the defendant. And, while N.J. Ct. R. 4:4-1 appears to require that service be made within ten days of filing a complaint, dismissal of a suit for failure to comply with this rule is within the "sound discretion" of the court. *McLaughlin* v. *Bassing*, 51 N.J. 410, 241 A.2d 450 (1968) (adopting dissenting opinion in the Appellate Division, 100 N.J. Super. 67, 241 A.2d 237 (App. Div. 1967)); *Hudanich* v. *Borough Council of Avalon*, 183 N.J. Super. 244, 433 A.2d 777 (Law Div. 1981); N.J. Ct. R. 4:37-2(a) (incorporated into N.J. Ct. R. 4:4-1). Thus, a complaint will not be dismissed for late service if a plaintiff has had legitimate difficulty serving a foreign corporation. Even if any problems remain, they could readily be addressed by amendment to the New Jersey rules which would ensure that a complaint will not be dismissed in cases where a New Jersey plaintiff has legitimate difficulties in serving a defendant. In sum, under the *Pike* analysis, "the nature of the local interest" to be protected by the statute could easily "be promoted, [if it is not already being promoted,] with a lesser impact on interstate activities."

Thus, even had a foreign corporation filed the appropriate notice with the New Jersey Secretary of State on August 23, 1984, it would have available to it a statute of limitations defense only in those New Jersey personal injury actions *filed on or after August 23, 1986*, and only in those New Jersey actions for property damage or breach of contract *filed on or after August 23, 1990*.

Because the New Jersey Supreme Court's ruling declaring the prior tolling statute unconstitutional was applied by that court wholly prospectively so that "the statute of limitations as to foreign, unrepresented corporations commences to run as of [August 3, 1983]," Pet. App. at 19a, there are now hundreds of otherwise untimely cases pending in both New Jersey state and federal district courts which could never have been brought if the New Jersey Supreme Court was correct in its constitutional invalidation of the prior tolling statute and, if, as we argue in our own September 11, 1984 petition, the decision on the constitutionality of the tolling statute should be applied retroactively. Honda Pet. at 5 & n.4. Indeed, because of the lower court's prospectivity ruling, there will doubtless be hundreds of additional otherwise untimely cases filed before the new tolling statute allows foreign corporations to raise a statute of limitation defense, which, in the case of a breach of contract action, could not be before August 23, 1990.

Therefore, any substantial federal questions pertaining to the New Jersey tolling statute at issue here will have great significance to the administration of justice within the New Jersey state and federal courts for years to come. Moreover, the questions raised in Honda's petition have *general* constitutional significance in that they address the manner in which state courts should handle the retroactivity of federal constitutional decisions. Finally, as cross-petitioner acknowledges, Cross Pet. at 7, the new tolling statute itself raises substantial Commerce Clause issues, and, thus, for this reason as well, the statute can-

not be viewed as in any way resolving or diminishing the importance of any substantial federal questions raised herein.[6]

Our only difference with cross-petitioner on this issue is that, while the new tolling statute should not interfere with this Court's consideration of substantial federal questions raised herein, we do not in the first instance view cross-petitioner's issues as being worthy of this Court's further review, whereas we do view the

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[6] The New Jersey legislature, in amending the tolling statute, has apparently adopted the position of the dissenters in *Coons I*, *i.e.*, that by changing the name of the requirements imposed on foreign corporations by the tolling statute, the Commerce Clause problem is avoided. The point, however, is that the *Allenberg-Cotton* line of cases discussed above did not turn on whether or not a state requirement was deemed "registration." Indeed, in one of those cases, *International Textbook* v. *Pigg*, 217 U.S. 91, 110-11 (1910), the Court acknowledged that the requirements imposed by Kansas on foreign corporations (filing a statement giving information about the corporation with the Kansas Secretary of State, *id.* at 102-03) did not technically include procuring a "license" to do business in the State. Still the Court struck down the state law because the "effect" of the filing requirement "[was] practically the same as if a formal license was required as a condition precedent to the right to do . . . business [in Kansas]." Rather than implying anything magical about a"registration" requirement, then, the *Allenberg Cotton*-line of cases stands for the principle that a state may not condition certain privileges on compliance by a foreign corporation with state requirements such as designation of an agent. In addition, the burden imposed on foreign corporations by the new statute may be substantial. Designation of an agent in the manner required could make New Jersey a forum in which the foreign corporation might readily be sued by non-New Jersey plaintiffs—perhaps even on causes of action not arising out of the corporation's New Jersey contacts. *E.g.*, *Randolph Laboratories, Inc.* v. *Specialities Development Corp.*, 62 F. Supp. 897, 898-99 (D.N.J. 1945); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super. 52, 60-62, 283 A.2d 551, 555-56 (Law Div. 1971). *See generally Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939); *Restatement (Second) of Conflict of Laws* § 44 & Comment a (1971).

issues presented in our petition as being ripe for this Court's consideration.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 9, 1984

SUPREME COURT OF THE UNITED STATES

(1)
84–385 HONDA MOTOR COMPANY, LTD.
v.
WALTER P. COONS

(3)
84–591 WALTER P. COONS
v.
HONDA MOTOR COMPANY, LTD.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Nos. 84–385 AND 84–591. Decided January 7, 1985

The petitions for writs of certiorari are denied.

JUSTICE REHNQUIST, dissenting.

In his cross-petition for certiorari Walter P. Coons seeks review of the New Jersey Supreme Court's holding that the New Jersey tolling statute, N. J. Stat. Ann. 2A:14–22 (West 1952), violates the Commerce Clause of the United States Constitution because it tolls the statute of limitations for claims against corporations not represented in New Jersey. *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 463 A. 2d 921 (1983). We upheld the constitutionality of this statute against Equal Protection and Due Process challenges in *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404 (1982). We expressly reserved the Commerce Clause question in *Searle* because the applicable New Jersey law was unclear. *Id.*, at 413–414. We also remanded to New Jersey courts a previous petition for certiorari arising out of Coons' lawsuit, for reconsideration in light of *Searle*. *Honda Motor Co.* v. *Coons*, 455 U. S. 996 (1982). That remand resulted in the New Jersey Supreme Court holding here, which Coons claims misapplies the Commerce Clause. Coons' suit has clarified the New Jersey law on the subject, and in striking down the New Jersey statute I think that the Supreme Court of New Jersey has gone beyond any of our Commerce Clause decisions. I would grant certiorari to review its decision.

Coons was burned badly when the fuel filler cap on his Honda motorcycle malfunctioned during a collision. New Jersey provides a 2-year statute of limitations for the type of injury suffered by Coons. N. J. Stat. Ann. 2A:14–2 (West 1952). Coons waited four years, however, and brought suit in state court against Honda Motor Co. (American Honda) and its parent Honda Motor Co. of Japan (Honda of Japan). American Honda had a certificate to do business in New Jersey, as required by N. J. Stat. Ann. 14A:13–4 (West 1969); Honda of Japan had no certificate. Because Honda of Japan had no certificate it was not "represented" in New Jersey under N. J. Stat. Ann. 2A:14–22 (West 1952), and that statute therefore tolled the 2-year limitations period for all unrepresented corporations.[1] Thus American Honda successfully asserted a statute of limitations defense to Coons' complaint, but Honda of Japan could not.

A divided New Jersey Supreme Court held that interstate commerce was unconstitutionally burdened by § 14–22's requirement that a foreign corporation must qualify to do business in New Jersey before it could avail itself of the statute of limitations provided in N. J. Stat. Ann. 2A:14–2 (West 1952). The court relied on, *inter alia*, our holdings in

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[1] New Jersey Stat. Ann. 2A:14–22 (West 1952), has now been amended. See 1984 N. J. Laws, ch. 131. At the time of this lawsuit the statute stated in part:

[I]f any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by this section. . . ."

According to the New Jersey Supreme Court, a corporation cannot be "represented" in New Jersey for purposes of the above statute until it has received a certificate of authority to do business. See *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 312–316, 463 A. 2d 921, 924–925 (1983).

Allenberg Cotton Co. v. *Pittman*, 419 U. S. 20 (1974), and *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914) to describe the tolling statute as a "forced-licensure provision," which when placed on corporations engaged in interstate commerce amounted to a "per se" violation of the Commerce Clause. 94 N. J., at 316–319, 463 A. 2d, at 926–927. Although both *Allenberg Cotton* and *Sioux Remedy* involved States which closed their courts entirely to foreign corporations, the New Jersey Supreme Court held that the rationale of those cases extended to the mere tolling of a statute of limitations against corporations unrepresented in the State.

I am not so sure that *Allenberg Cotton* and *Sioux Remedy* can be taken so far. The States involved in those cases totally barred foreign corporations from the state courts. Thus out-of-state corporations which entered into contracts in-state had no forum in which to enforce those contracts, and out-of-state competition was effectively precluded. New Jersey, however, provides greater protection to the contractual and legal interests of foreign corporations. For example, N. J. Stat. Ann. 14A:13–11 (West 1969), states in part:

> "(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State."
>
> See also *Materials Research Corp.* v. *Metron, Inc.*, 64 N. J. 74, 312 A. 2d 147 (1973)

The contested New Jersey statute simply tolls the statute of limitations for most civil suits. As the Court noted in *Searle*, the tolling statute attempts to preserve a cause of action against absent defendants who may be difficult to find and difficult to serve. 455 U. S., at 410. Moreover, the enactment of the New Jersey long-arm statute has not fully

relieved the difficulty facing residents injured by absent defendants. See *ibid.*

The statute does not place an insuperable burden on a foreign corporation because the corporation may always plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself. See *id.*, at 411. All the corporation need do to commence running of the limitations period is to become represented in New Jersey. As we stated in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945), and reiterated in *Searle*, 455 U. S., at 408, statutes of limitations represent a public policy decision about the privilege to litigate. Their shelter has never been a fundamental or natural right, but is provided only by legislative grace, subject to a relatively large degree of legislative control.

In drafting the contested statute the New Jersey Legislature sought to balance reasonable protection of its citizens from foreign tortfeasors against the requirement for unimpeded interstate commerce. The impact on interstate commerce here is fairly negligible. The New Jersey Supreme Court provided little discussion of why interstate commerce would actually be impeded by tolling a statute of limitations, subject to a laches defense, against an absent defendant not represented in the State. The existence of the tolling provision certainly did not dissuade Honda of Japan from selling motorcycles in New Jersey.

As we stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."
> See also *Sioux Remedy*, *supra*, at 201.

The tolling provision of N. J. Stat. Ann. 2A:14–22 (West 1952), does not so scarcely benefit local interests and so

clearly burden interstate commerce that we should decline the opportunity to review this constitutional issue of first impression. The Court should grant certiorari review for Nos. 84–385 and 84–591.[2]

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[2] Honda of Japan brought the main petition in this case, No. 84–385, complaining of the New Jersey Supreme Court's decision, on rehearing, to apply its Commerce Clause holding prospectively. See *Coons* v. *Honda Motor Co.*, 96 N. J. 419, 476 A. 2d 763 (1984). The cross-petition, No. 84–591, was filed under this Court's Rule 19.5, and this Court should grant both the main petition and cross-petitions in order to reach the latter. See this Court's Rules 19.5, 20.5. If we were to reverse the New Jersey Supreme Court's Commerce Clause holding, there would be no need to address the issue presented in the main petition.